

# **Universal Jurisdiction**

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# 1 Introduction

## 1.1 Background

The atrocities of World War II urged the international community to adopt several multilateral conventions for the purpose of criminalizing specific acts and providing for the accountability of their perpetrators, but the procedural rules governing the allocation of criminal jurisdiction remained unelaborated upon. Since the Nuremberg and Tokyo tribunals, save for few sporadic cases, there were neither international nor national prosecutions of the proscribed acts. The establishment of the International Criminal Tribunal for the Former Yugoslavia<sup>1</sup>, the International Criminal Tribunal for Rwanda<sup>2</sup> and the International Criminal Court<sup>3</sup> coupled with the exercise by few states of various forms of extraterritorial and rarely universal jurisdiction in highly sensitive cases has given the debate over the principle of universal jurisdiction further impetus.

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<sup>1</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, Annex (1993), *reprinted* in 32 I.L.M. 1163 app.1192 (1993) [hereinafter the ICTY]. France has enacted a special law to govern the co-operation with the ICTY and the ICTR, the laws confer on the French courts for all the crimes falling within the cognizance of the tribunals. Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford University press (2003).p.133.

<sup>2</sup> Statute of the International Tribunal for Rwanda, U.N.SCOR, 49<sup>th</sup> Sess.,3453<sup>rd</sup> mtg., Annex, at 3, U.N.Doc. S/Res/955 (1994) reprinted in 33 I.L.M. 1598,1602 (1994)[hereinafter the ICTR].

<sup>3</sup> Rome Statute of the International Criminal Court, July 17,1998,UN Doc.A/CONF.183/9,37 I.L.M.1998.[hereinafter the ICC]. To meet the complementarity jurisdiction of the ICC, Germany enacted a national code of *Crimes Against International Law*(VStGB) entered into force ON 30 June 2002 , *ibid.*, p. 144. For the same purpose The Netherlands enacted the Act of 19 June 2003 (International Crimes Act), an English translation available at:

[http://www.minbuza.nl/default.asp?CMS\\_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73-](http://www.minbuza.nl/default.asp?CMS_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73-) (last visited 08.06.2006).

Owing to its nature the universality principle is a complex and controversial one, for it ultimately relies on the expansion of a state's national criminal jurisdiction to adjudicate enumerated international crimes committed outside its territory by and against non-national and without any actual or legal link to or effect on the enforcing state. Since international crimes are often committed in pursuance and execution of state policy.<sup>4</sup> The exercise of universal jurisdiction, therefore, entails the adjudication of another state's high ranking officials which might be considered as affront to the latter's sovereignty.

The debate over the principle has been dominated by the discussion of its merits and drawbacks. Human rights<sup>5</sup> activists consider the principle, among other mechanisms, as an indispensable tool to vindicate human rights and combat impunity of their violators in the international arena, therefore, their normative discussion focuses mainly on the doctrine's desirability and role to achieve these noble goals. To confirm the principle's availability, they often cite a set of judicial pronouncement where the universality principle was dealt with.

In stark contrast, other scholars and statesmen focus on its controversial relationship with other deep-rooted institutions of international law, namely the equal sovereignty of states and its corollary the non-interference in the internal affairs of other sovereigns<sup>6</sup>. They denigrate the principle by emphasizing its pitfalls and its ability to disrupt international order and to endanger international peace<sup>7</sup>.

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<sup>4</sup> The Nazi regime, Khmer Rouge in Cambodia, Pinochet in Chile, Milosevic in the Former Yugoslavia and The Hutu in Rwanda.

<sup>5</sup> See Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (September 2001) AI Index: IOR53/002/2001, p.18. The organization reported that 120 states have provided their courts with universal jurisdiction for war crimes, crimes against humanity 100 states, genocide 70 states and torture (not amounting to crime against humanity) 80 states.

<sup>6</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) 2000 I.C.J. 235 (Dec. 13, 2000)

available at [www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm](http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm) (last visited 05.05.2006)

<sup>7</sup> See Gene Bykhovsky, *Argument Against Assertion of Universal Jurisdiction By Individual States*. 21 Wis Int'l L.J.P. (2003). P.161. See also H. Kissinger observing that "[i]t would be ironic if a doctrine

These two schools have one common characteristic, that is, their loose use of the term universal to describe the assertion of jurisdiction in cases when the courts were actually exercising other forms of jurisdiction over extraterritorial events.

The lack of a comprehensive international convention regulating the jurisdiction of states in criminal cases compounded by the paucity of practice left the doctrine intricate and under-theorized<sup>8</sup>. It is still replete of contentious questions concerning its theoretical bases and to what extent do states accept and practice it with regard to human rights related crimes.

## 1.2 The subject

The paper attempts to clarify the terminological confusion surrounding the principle and tries to distinguish between the universality principle and other forms of jurisdiction where a state is prosecuting a person present in its territory for acts he committed abroad.

The thesis enquires the current status of the principle to see whether it exists as an established legal principle in the international law. The term universal jurisdiction is reserved to describe the unilateral exercise of jurisdiction over non-present individuals and against the objection of their national state for enumerated international crimes regardless of their locality, the nationality of the perpetrator or the victim and where the alleged crime has no affect on the interests of the prosecuting state.

## 1.3 Organization and method

The principle at question belongs to the broad area of extraterritorial criminal jurisdiction. Therefore I will proceed by shortly presenting the various grounds of criminal jurisdiction, followed by an attempt to define the universality principle by

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designed to transcend the political process turns into a means to pursue political enemies rather than universal justice". *The Pitfalls of Universal Jurisdiction: Risking judicial* .foreign Affairs 80 (2001).p.86.

<sup>8</sup> Leila Nadya Sadat '*Redefining Universal Jurisdiction*' observed that "While courts and commentators use the term "universal jurisdiction" repeatedly, rarely do they stop and consider its implications. Indeed, universal jurisdiction as a concept has been under-theorized." (2001) New Eng L. Rev. 244

delineating its scope and nature. To conduct that I will illustrate how the principle usually portrayed in the legal literature and in some judicial pronouncements in ways confusing it with other heads of extraterritorial jurisdiction. Then I will explore the principle's relation to the concept of *jus cogens* and obligations *erga omnes*, and its stand regarding the notion of state sovereignty.

After setting forth the principal question to be answered I will in chapter III examine the circumstances under which the principle emerged as a convenient tool to combat piracy, furthermore, I will analyze the pronouncements of the frequently cited precedents for its application, in order to establish whether there exist a historical evidence of its legitimacy and consequential extension beyond piracy to prosecute serious crimes of international humanitarian law and human rights law.

Chapter VI starts with analyzing thoroughly the jurisdictional clauses of the Genocide Convention, the 1949 Geneva conventions and the first additional protocol, to find whether they provide, as direct source of international law, for universal jurisdiction. By doing so, I will illustrate which jurisdictional grounds their drafters had conferred on state parties and how they construed and practiced those conventions in order to determine whether there is practice and *opinion juris* capable of evidencing a customary international norm entitling states to practice the principle.

Regarding crimes against humanity there is no general convention that specifies the way the relevant crimes may be prosecuted, and the discussion will be confined to viewing state practice through the relevant case law.

In the last chapter, a conclusion of the discussions in the previous chapters will be presented, an emphasis will be placed on how the decision in the Arrest Warrant case will affect the exercise of the principle.

The discussion will mainly focus on the penal provisions of the international treaties and customary international law as the principal sources of international law<sup>9</sup>, without

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<sup>9</sup> *Statute of International Court of Justice*, Art 38(1), 59 Stat 1055, T.S.No 993 (1945)

denying the significance of other subsidiary sources<sup>10</sup>. The research will be conducted by critically assessing the writings of some prominent legal scholars advocating the existence of the principle and confronting their arguments with hard rules of international law and case law applications, to find out whether their arguments provide plausible grounds to prove the existence of the principle.

#### 1.4 Limitations

The thesis examines solely the corpus of international rules regulating the allocation and the legal consequences of exercising the extraterritorial jurisdiction among states without any reference to the efficiency or the potential pitfalls of the principle.

The research is concerned only with criminal jurisdiction as opposed to civil litigation where the outcome of the case will be limited to restitution or compensation.

Universal jurisdiction exercised unilaterally by municipal court in an “unaffected state” is the subject of the paper, and not the jurisdiction of international permanent or ad hoc tribunals which exercise territorial jurisdiction pursuant to the mandate entrusted to them by the international community<sup>11</sup>

International crimes will be used as shorthand to describe exclusively genocide, grave breaches of the Geneva Conventions and crimes against humanity.

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<sup>10</sup> Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in *the Arrest Warrant Case*, noted that the writings of publicists “cannot of themselves and without reference to other sources of international law, evidence the existence of a jurisdictional norm”. Para44. [hereinafter Joint Separate Opinion]

<sup>11</sup> L. Sadat, *ibid* 8, uses the term universal international jurisdiction to describe the jurisdiction of the international tribunals.



## 2 Definition and scope of universal jurisdiction

### 2.1 Background

Jurisdiction refers to a state's legitimate assertion of authority to affect legal interests<sup>12</sup>, it might be legislative, adjudicative and enforcement jurisdiction.

The principles relating to state jurisdiction, as the other institutions of international law are based on considerations of state sovereignty and its corollaries the doctrine of sovereign immunity and the prohibition of intervention in other states affairs<sup>13</sup>.

Therefore jurisdiction is traditionally exercised by a state over crimes perpetrated within its boundaries<sup>14</sup>.

Legislative and judicial jurisdiction coincide, a national court applies the domestic criminal law even when the proscribed act takes place abroad. legislative jurisdiction is absolutely linked to state sovereignty but not the jurisdiction to adjudicate and to enforce, a state may have legislative jurisdiction without having the opportunity to enforce it, for instance, where the act is committed abroad and the offender is not extraditable, or when the alleged criminal is immune under international law.

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<sup>12</sup> Kenneth C. Randall, *Universal Jurisdiction under International Law*, Tex. L Rev, vol 66 (1988).p.786.

<sup>13</sup> Ian Brownlie, *Principles of International law*, he described the international law as "the whole of the law could be expressed in terms of the coexistence of sovereignty" (1990 4<sup>th</sup> ed).p.288.

<sup>14</sup> Ibid. he observed that "the principal corollaries of state sovereignty and equality of states are (1) a jurisdiction, prima facia exclusive, over a territory and the permanent population living there; (2) a duty of non- intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor" p 285.

As a general rule of international law, a state could agree to permit on its territory the exercise of jurisdiction by another state<sup>15</sup>.

The territoriality of state jurisdiction is the dominant form but certainly not an exclusive one, there exist accepted other bases of jurisdiction permitting a state to assert its criminal jurisdiction over crimes committed outside its borders.

## 2.2 Extraterritorial Jurisdiction

Extraterritorial jurisdiction denotes “The assertion of authority by a state to affect legal interests of individuals whose actions occur outside the state’s territory.”<sup>16</sup>

Many commentators begin the enquiry by discussing the decision of the Permanent Court of International Justice (PCIJ) in the Lotus Case in 1927.

The court pronounced on the right of Turkey to try a French officer for the death of eight Turkish nationals as a result of a collision between the French steamer Lotus and the Turkish collier Boz-Court on the high seas.

The underlying dispute was the French contention that in order to have jurisdiction over the French officer, Turkey should establish its competence on specific entitlement recognized by international law. Turkey on the other hand based its jurisdiction on the lack of international norms that prohibited such jurisdiction.

The court concluded that there was no rule in the international law that confer exclusive jurisdiction on the flag state over its ships in the high seas, and decided the case on the basis of objective territoriality which is not prohibited by international law, since the damage to the Turkish ship affected the Turkish territory.

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<sup>15</sup> Malcolm N. Shaw, *International Law*, cited several treaties, for example, the Protocol concerning Frontier Control and Policing, Co-operation in Criminal Justice between the United Kingdom and France whereby each state is permitted to exercise jurisdiction within the territory of the other one in issues relating to channel tunnel between them.p.185-186.

<sup>16</sup> Michael. P.Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*. 35 New Eng. L.Rev. (2001),p.366.

The Lotus decision is often cited by those defending the freedom of states to stretch their jurisdiction<sup>17</sup>, but they confine themselves to the passage where the court stated that:

“Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.”<sup>18</sup>

They deduce from this passage that unless it is prohibited by an identifiable rule of international law, states are free to exercise any form of jurisdiction. This reading could lead to the conclusion that all innovative bases of jurisdiction would be permissible because since being new there would be no rule against them.<sup>19</sup>

This contradicts the gist of the Lotus decision because after the above cited passage the court proceeded by raising the question of:

“Whether the foregoing considerations really apply as regards criminal jurisdiction”<sup>20</sup>

It then ruled that either this might be the answer, or alternatively, that:

“[t]he exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent states from extending the criminal jurisdiction of their courts beyond their frontiers”<sup>21</sup>

It becomes apparent that the Lotus decision may not sustain the proposition that absent a prohibitive rule, the extension of jurisdiction is unlimited.

Regardless of the judgment’s relevance<sup>22</sup>, it is unanimously agreed that international law imposes certain limits on the expansion of state’s extraterritorial jurisdiction which the Lotus judgment confirmed by stating that:

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<sup>17</sup> Belgium and Judge Van den Wyngaert in the arrest warrant case. relied heavily on the Lotus principle by asserting that absence any prohibitive rule Belgium was free to expand the reach of its jurisdiction.

<sup>18</sup> *The Lotus Case*, Judgment No.9,1927,P.C.I.J, Series A, .18.19.,

<sup>19</sup> M. Morris, “*High Crimes and Misconceptions: The ICC and Non-Party States*” 64 Law & Contemp Prob (2001).p.47.

<sup>20</sup> Ibid,20

<sup>21</sup> Ibid,20

“This discretion left to States by International Law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States [...] In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>23</sup>

Under customary law of criminal jurisdiction, the assertion of jurisdiction has to be grounded on a legitimate prosecutorial interest based on the criminal act or the alleged criminal linkage to the prosecuting state<sup>24</sup> which will be the case when the prosecution falls under one of the recognized principles of jurisdiction.<sup>25</sup>

It is very important to bear in mind that the rules of allocating jurisdictions are not crystal clear in international law and that they interweave in practice, in addition to that, many national courts do not articulate the grounds of their jurisdiction or they just cite various forms in an equivocal fashion<sup>26</sup>. For such reasons the task of presenting these principles in predetermined moulds is always inconclusive<sup>27</sup>.

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<sup>22</sup> The case did not involve international crime and the French officer was arrested in Turkey. See also Reydams, *ibid* 1, he pithily stated that “[t]wo major conclusions could be drawn from the pronouncement. First, international law governs the area of extraterritorial jurisdiction over foreigners. If states had absolute discretion, extraterritorial jurisdiction would simply not be an issue. Second, international law recognizes (multiple) concurrent jurisdictions. If states were forbidden from extending the application of their criminal law and jurisdiction of their courts to persons and acts outside their territory, then extraterritorial, and *a fortiori* universal jurisdiction would be illegal and that would be the end of the discussion. So the extreme views [...] seem to have been completely abandoned.” p.16.

<sup>23</sup> “Lotus”, *ibid* 18, at .12-13.

<sup>24</sup> Brownlie, *ibid* 13, stated that “The principles are in substance generalization of mass of national provisions.” And that “It may be that each individual principle is only evidence of reasonableness of exercise of jurisdiction.” P306.

<sup>25</sup> *Ibid*, noting that there should be a substantial and bona fide connection between the subject matter and the source of jurisdiction.” p.313. See also Fritz A. Mann, observing that “[i]n essence criminal jurisdiction is determined not by such external, mechanical and inflexible tests as territory or nationality, but by the closeness of a state’s connection with, or the intimacy and legitimacy of its interest in, the facts in issue:”, *Studies in the International Law*. No.3(1974)p.80, cited in M. Morris, *ibid*, 19, p.49.

<sup>26</sup> *United State v. Younis*, District Court, February 12, 1988, the court referred to the universality principle, where the case was a pure application of the passive nationality principle, quoted in Luis

Generally, international law recognizes six bases for the exercise of extraterritorial jurisdiction:

1. Derivatives of Territorial jurisdiction: A state has the right to subject to its criminal law crimes committed on its territory, the interest and competence is self-evident when the crime takes place within the state's boundaries, but may a state rely on this ground of jurisdiction to prosecute an alien present on its territory for crimes committed abroad?

Many answer in the affirmative based on the forum state's uncontested right to defend its public order as an expression of its internal sovereignty, because the mere presence of an unpunished criminal threatens the domestic moral and legal order.<sup>28</sup>

A further view propounded that the mere categorization of a specific act as an international crime turns the prohibition into a peremptory norm permitting the custodial state to establish its jurisdiction over a present alien.<sup>29</sup>

This form of jurisdiction has been utilized as the jurisdictional ground to enforce many international conventions, starting with genocide<sup>30</sup>, apartheid<sup>31</sup> followed by various Terrorist conventions<sup>32</sup>.

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Benavides, *The Universal Jurisdiction Principle: Nature and Scope*, *Anuario Mexicano de Derenchos International*, Vol.p.24.

<sup>27</sup> Brownlie, *ibid* 12, declared that "[t]here is some risk in presenting the law in a schematic form, yet the usual presentation of different facets of jurisdiction is separate competences can obscure certain essential and logical points." P.309.

<sup>28</sup> The opinion of Bursa in the report of Von Bar and Bursa presented in the context of the Institute of International Law, Munich Session of 1883, quoted in L. Reydams, *ibid* 1.p.31.

<sup>29</sup> M. Shaw, *ibid*.15, stated that "[i]nternational law recognises that domestic legal orders may validly establish and exercise jurisdiction over the alleged offender. Such circumstances thus include the presence of the accused and in this way may be differentiating from universal jurisdiction as such." P.598.

<sup>30</sup> Article VI of the U.N. *Convention on the Prevention and Punishment of the Crime of Genocide* 9 Sep, 1948. U.N.T.S.,Vol.78,p.277.

<sup>31</sup> Article 5 of the U.N. *International Convention on the Suppression and punishment of the Crime of Apartheid*, 30 Nov, 1973. I.L.M, 13(1974),P.50.

Another derivative of the territorial principle is the effect principle, which confers on the state the authority to judge non-territorial acts that have a substantial territorial effect on the state's interests. In the United States the latter is recognized as an independent basis of jurisdiction frequently employed to try violations of security exchange regulations.<sup>33</sup>

(ii) The Nationality principle and other personal links: A state has jurisdiction over crimes committed by its nationals abroad. Some states restrict the reach of their jurisdiction under this basis by requiring that the act is criminalized under the law of the place of commission, or is punishable with certain degree of severity, such restrictions are self imposed and are not required by international law. In exercising this form of jurisdiction the nationality state is regulating crimes which properly occurred within the domestic jurisdiction of the territorial state. To resolve such concurrence of jurisdictions scholars have referred to the concept of proper law or genuine link, which could be established by searching for the "state or states whose contact with the facts is such as to make the allocation of legislative competence just and reasonable."<sup>34</sup>

Some states expand the nationality basis by recognizing other personal links between the state and the individuals present on its territory because by willingly choose to have the legal residence in a foreign state, a person establishes a legal links with the state of residence and accepts its laws.

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<sup>32</sup> For instance article 3 of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*. 14 Dec 1973, *ibid.* p.41.

<sup>33</sup> Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption against Extraterritoriality*, 21 *Hastings Int'l & Comp. L.* (1997).p.182.

<sup>34</sup> Fritz A Mann, *The Doctrine of Jurisdiction in International Law*, *Recueil des cours* III (1964). P.44-48 cited in D.W. Bowett, *Jurisdiction: Changing Patterns Of Authority Over Activities And Resources*, *Brit.Y.B.Int'l*(1982) p.8.

Denmark,<sup>35</sup> Iceland, Liberia, and Sweden claim jurisdiction over crimes committed abroad by their permanent residents. In few cases the United Kingdom<sup>36</sup> has also based jurisdiction on residence<sup>37</sup>.

Under such laws it could be argued that the jurisdiction is territorial, “[b]ut in reality it is not, for the obligations imposed often bear on the person whilst abroad. In reality the resident is assimilated to the national [...], for the purpose of the particular legislation in question, the resident’s links with the state are as close as those of a national<sup>38</sup>.

(iii) Passive nationality: A state may assert jurisdiction where the victim of the act is a national of the state asserting jurisdiction<sup>39</sup>

(iv) Protective principle: A nation may exercise jurisdiction over individuals who have committed an act abroad which is deemed prejudicial to its security and economy. The classic crimes for this type of jurisdiction are those of violating immigration regulations, drug trafficking and counterfeiting of national currency.<sup>40</sup> National legal systems do not contain a uniform regulation of what could be considered a vital interest.<sup>41</sup>

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<sup>35</sup> The Danish Penal Code Strfl §7(1) (2) contains a general active personality clause extends to resident aliens, and to citizens and resident aliens of Finland, Iceland, Norway, or Sweden, provided their presence in Denmark. Reydamas, *ibid.* 1. p.126.

<sup>36</sup> In the U.K the nationality principle is practiced to prosecute present aliens for war crimes committed during the Second World War as well as crimes envisaged in the Statute of the ICC, in Brazil with regard to genocide. Antonio Cassese, *International Criminal Law*.p.282.

<sup>37</sup> Michael Akehurst, *Jurisdiction in International Law*, Brit.Y.B.Int’l.(1972/73).p.156. See also Jurgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, Harvard Int’l L J. Vol 31, No 1, he used the term principle of domicile to describe this form of jurisdiction.p.112.

<sup>38</sup> Bowett, *ibid* 34.p.8-9.

<sup>39</sup> Reydamas, *ibid* 1. In France the *cour d’assises* of Paris tried and convicted in absentia Captain Alfredo Astiz, a member of the Argentine military junta, for the kidnapping and disappearance in Argentina of two French nuns. p. 132.

<sup>40</sup> L Benavides, *ibid* 26.p.26.

<sup>41</sup> Remarkably, Article 161(2) of the Turkish Criminal Code renders liable to punishment “whoever, in time of peace, spreads or relates unfounded or intentional rumours or news so as to cause the excitement and unrest of the public, or engage in activities harmful to national interests..” .D.W.Bowett, *ibid* 34.p.11. Another example article 13 of the Israeli Penal Law which provides for protective jurisdiction extending

(v) The presentation principle: A state may exercise extraterritorial jurisdiction where it deemed to be acting for another state which is more directly involved, provided that certain conditions are met. In general, these conditions are a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition.<sup>42</sup>

The Germanic legal systems<sup>43</sup> use the term vicarious administration of justice based on the maxim *aut dedere aut judicare* which has been codified in the national penal codes long before its appearance in the international criminal law conventions.<sup>44</sup> Under the German and Austrian laws the maxim is applicable towards all states without the need for a specific extradition treaty with the state of the commission or the nationality state. Their courts have the competence to prosecute any present alien for acts committed abroad where the more competent state virtually consent to that jurisdiction or in such circumstances where extradition is impossible because the criminal jurisdiction of the territorial state is temporarily ineffective. The principle has been actively employed in the prosecution of serious crimes perpetrated in the former Yugoslavia in the 1990's. This system is presented as the most important supplement to territorial jurisdiction<sup>45</sup>. Different theories have been articulated to justify its exercise as a form of complementary jurisdiction<sup>46</sup>. As a pragmatic explanation it has been suggested that:

“An offence should never remain unpunished; the possibility to cross borders should not shield the common criminal from punishment. He has to be aware that wherever he goes he will be held responsible. It is thus the duty of the custodial state to supply an inadequacy of the territorial state and the state of nationality of the offender, which by

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to offences committed abroad against any Israeli national, resident, or a Jew as such. .Reydams, *ibid* 1.p.158.

<sup>42</sup> Council of Europe. *European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction* (1990). 14, quoted in Reydams, *ibid*. 1 p. 22.

<sup>43</sup> This form of jurisdiction is provided for in Germany “*stellvertretende Strafrechtspfleg*” in the StGB§ 7(2)(2) quoted in L. Reydams. *Ibid* 1. p. 143, and in Austria the StGB§65(1) (1).*ibid*. p. 95.

<sup>44</sup> Austrian Penal Codes of 1803 and 1852 established this ground of jurisdiction, *ibid*1.p.30.

<sup>45</sup> J. Meyer, *ibid*, 37. p.115.

<sup>46</sup> Reydams, *ibid* 1, cites opinions of several prominent scholars justifying the jurisdiction of the custodial state either on natural law considerations or on positivism. P.28-34.



hypothesis cannot act. To defeat the eventual calculations of the offender, that is the master idea of the subsidiary jurisdiction.”<sup>47</sup>

Vicarious jurisdiction differs from the universality principle, in that it is rather a result of denying a safe haven to a fugitive, than a positive right to exercise universal jurisdiction.<sup>48</sup>

However, in theory, the representational aspect in this regard may become doubtful when the state that possesses the strongest link objects to the competence of the custodial state. In reality states are bent on prosecuting crimes on their territories or by or against their nationals. Therefore, a concerned state would probably react by either delegating its competence through consent or alternatively demanding the offender’s extradition.

(vi) Universal jurisdiction: “A state has jurisdiction to unilaterally prescribe, adjudicate, and enforce laws. This amounts to firstly establishing its laws with regard to persons, secondly applying these laws to these persons in criminal proceedings, and finally inducing or compelling compliance or punishing non-compliance, with these laws. Thus, when a state exercises its unilateral jurisdiction by virtue of the principle of universality, it establishes its jurisdiction over a crime without it having a link to the crime. The state in question is acting without delegation of jurisdiction over the matter by state that is linked to the crime and in the absence of any delegation (fictive or real) on behalf of the international community at large”.<sup>49</sup>

In the light of the above, the assertion of extraterritorial jurisdiction could be based on various grounds but such expansion of jurisdiction is not always universal, and sometimes it is difficult to distinguish in practice the various principles in an absolute

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<sup>47</sup> K. Miklitzanski, *Le system de l’universalite du droit de punir et le droit penal subsidiaire*, (1936) p. 331-333, quoted in Reydamas *ibid* 1. p.33.

<sup>48</sup> Donnedieu de Vabers, quoted in Reydamas, *ibid* 1. p. 37.

<sup>49</sup> Nicholas Strapatsas, *Universal Jurisdiction and the International Criminal Court*. 29 *The Manitoba Law Journal*, (2002).p.2.

manner<sup>50</sup>. Nevertheless, a test could be adopted to differentiate the other principal grounds from the universal principle. The defining line is that the latter is exercised without an evidently criteria, requirement or link to the state's territory or inhabitants, thus, if such underlying considerations exist in a concrete case the jurisdiction could not be conceived as universal, because the universality principle implies that all states are affected by the act in question, and have the same interest in prosecuting its perpetrator<sup>51</sup>.

Before embarking upon a detailed exposition of the principle in question, it is important to note that the term universal has been used indiscriminately to describe different concepts in the realm of international criminal law. Therefore, one has to be mindful that the universal condemnation of a given crime does not justify its prosecution by every state. Such condemnation results in rendering the crime prohibited as customary international law norm binding every state even those non-parties to the proscribing convention, if there is one, with no affect on states jurisdictional competence<sup>52</sup>.

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<sup>50</sup> Brownlie, *ibid* 13, stated that “[t]he objective application of the territorial principle and also the passive personality principle have strong similarities to the protective or security principle. Nationality and security may go together, or, in the case of the alien, factors such as residence may support a rather ad hoc notion of allegiance.”.p.306. See also M.C. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, he stated that [T]here is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based, such as the presentation principle or the principle of protection. There are often different of opinions as to which principle should form the basis of a particular term of extraterritorial jurisdiction.’ 24 Va.J.Int’l L. (2001).P.103.

<sup>51</sup> Bassiouni, *ibid*, stated that “[T]he reach of a state may be universal to the extraterritorial jurisdiction theories ‘protected interests’ and ‘passive nationality’ but in all of them there is a connection or a legal nexus between the sovereignty and territoriality of the enforcing state[.] Thus, the universal reach of extraterritorial national jurisdiction does not equate with universal jurisdiction.” .p. 94 See also S.Z.Feller, *Jurisdiction Over Offences With a Foreign Element*, observing that the serious nature of some crime “[t]hreatens to determine the very foundations of the enlightened international community as a whole, and it is this quality that gives each one of the members of the community the right to extend the incidence of its criminal law to them..” cited in Lee A Steven, *Genocide And The Duty To Extradite or Prosecute: Why The United States Is In Breach Of Its International Obligations*. 39. Va .J. Int’l L. P.436.

<sup>52</sup> R.Higgins, *Problems & Process: International Law and How We Use It*, stated that the mere fact that an action is a violation of international law does not of itself give rise to universal jurisdiction. p.96. and

### 2.3 Universal jurisdiction

Negatively defined universal jurisdiction “means that there is no link of territoriality or nationality between the [prosecuting] state and the conduct or the offender, nor is the state seeking to protect its security or credit”<sup>53</sup>

A clear example of universal jurisdiction is provided for in the new German ‘Code of Crimes against International law’, it states that “This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany(emphasis added)”<sup>54</sup>

In practice, the proceedings initiated in Belgium and the issuance of the arrest warrant against the Minister for Foreign Affairs of the Congo epitomize the essence of universal jurisdiction, because neither Mr Yerodia nor the victims were Belgians, and the alleged crimes were committed outside Belgian territory, and he was not in Belgium when the proceeding initiated.

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in response to the claim made in the Restatement(Third) that International crime is presumably subject to universal jurisdiction, she added that attributing the notion of crime to a certain act would serve two purposes. The first is to attach a generalized sense of opprobrium to the offence in question. The second is to suggest that universal jurisdiction would be tolerated. p.62. See also Christian Tomuschat “*Issues of Universal Jurisdiction in the Schilingo Case*”, criticizing the reasoning of the Spanish court, he argues that “There can be no doubt that, to date, crimes against humanity recognized as crimes under international criminal law for the commission of which the perpetrator incur individual criminal responsibility. But the question of licence to prosecute is a different one. Even before attempting to show in a detailed analysis that universal jurisdiction exists for crimes against humanity. The *Audiencia Nacional* pre-emptively claims that this is the case. It is of the view that individual criminal responsibility and universal jurisdiction go hand in hand...” 3. J. I. C. J. (2005).P.1078.

<sup>53</sup> Reydams, *ibid* 1.p.5.

<sup>54</sup> *Code of Crimes against International Law* (VStGB§1) entered into force on 27 June 2002.L Reydams, *ibid* 1. p. 144.

The uncertainty surrounding the principle, in a considerable part, originates in the definitional approach taken by many commentators<sup>55</sup>. The term universal jurisdiction has been inaccurately employed to prescribe various forms of jurisdiction which are substantially different from the universal jurisdiction, for this reason it becomes essential from the outset to underline its intrinsic features and what it accurately denotes.

### 2.3.1 Universal jurisdiction *in absentia*

The term *in absentia* has been used, among other variations, to describe the universality principle that may mislead us to believe that there exist two distinct basis of universal jurisdiction, that is to say, universal jurisdiction *in absentia* and universal jurisdiction *in personna*, and consequently the validity of each has to be assessed independently of the other.

Requiring the presence of the alleged offender on the territory of the state as prerequisite to allow its exercise of universal jurisdiction<sup>56</sup>, constitutes the most common confusion of the term. The point here is that when the prosecuting state has apprehended the offender it becomes obliged under the relevant convention to extradite or prosecute him, if extradition proves infeasible, for factual or legal reasons, then it is empowered to exercise a conventional obligatory territorial jurisdiction. That is not the universal jurisdiction which distinctly envisages nothing else but the prosecution absent any nexus even the presence of the alleged criminal.

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<sup>55</sup> . Mark A. Summers, International Court of Justice's Decision in the Congo v. Belgium: How has it affected the Development of a principle of universal jurisdiction that would obligate All States to Prosecute War Criminals? He noted that "[t]he definitional problem is further complicated because in many cases the facts lend themselves to different interpretations, thus, what a court or commentator means when referring to universal jurisdiction is often unclear." *B. U. Int'l L. J.* Vol 21 (2003).p.70.

<sup>56</sup> Harvard Research took the view that universal jurisdiction "may be invoked only if the alien is present in a place subject to the authority of the state assuming jurisdiction," and "the presence of the accused provides the basis for jurisdiction" Harvard Research p .582, cited in M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, (INTERSENTIA, Antwerpen-Oxford) .p.54.

Separate Joint Opinion unequivocally acknowledged that prosecuting a present alien should not be confused with universal jurisdiction since the former is a treaty-based obligation to exercise jurisdiction over persons who commit acts elsewhere and are present within the state territory. It pointed out that it is more accurate to describe this as:

“Jurisdiction to establish a territorial jurisdiction over a persons for extraterritorial events” than as “universal jurisdiction”. The distinction limits the definition of universal jurisdiction to its purest form- exercising jurisdiction over international crimes without any other basis for jurisdiction in international law.”<sup>57</sup>

The above justifies the conclusion that the maxim of *aut dedere aut judicare* does not imply universal jurisdiction because its application is limited to the parties to a given convention which as a general rule of international law can create neither rights nor obligations for non-party states<sup>58</sup>. In contrast, universal jurisdiction is attributable virtually to any state since it is not premised on any specific contractual provision.<sup>59</sup>

Since all the core international crimes, except for crimes against humanity, are universally condemned by multilateral agreements providing for variable forms of the extradite or prosecute scheme, then by ratifying or acceding to one of these conventions, a state willingly recognizes the competence of the other states parties to prosecute its nationals whenever it does not request extradition.<sup>60</sup>

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<sup>57</sup> Separate Joint Opinion, *ibid* 10, para 44-57. To elucidate the difference between the principle and the conduct of trials *in absentia*, it noted that “[s]ome jurisdictions provide for trial *in absentia*, others do not. If it is said that a person must be within the jurisdiction at the time of trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law”. Para 56.

<sup>58</sup> Article 34 of *the Vienna Convention on the law of Treaties*, 23 May 1969, 1155 U.N.T.S.331.

<sup>59</sup> Bruce Broomhall, *Towards the Development of an effective System of Universal jurisdiction for Crimes under international Law*, considers that “The obligation of *aut dedere aut judicare*. Once a state ratifies or accedes to a treaty, it has no option on the matter. Hence, this form of jurisdiction is not truly universal”, but is a regime of judicial rights and obligations arising among a closed set of state parties” New Eng. L. Rev.(2001).p.401.

<sup>60</sup> Lord Slynn of Hadley in his speech before House of Lords in Pinochet 1, opined that “Chile was a state party to the Convention and it therefore accepted that, in respect of offences of torture, the United

There could be one hypothetical situation where the aforementioned application would appear unsound, namely in respect of crimes against humanity, in this case the prosecution of a present alien is obviously not a contractual obligation due to the non-existence of a treaty. Nevertheless, it could not be deemed universal for the reasons I will discuss in [2.3.2].

The extradite or prosecute clause is not provided for in the Genocide Convention or the 1949 Geneva Conventions<sup>61</sup> with regard to war crimes other than the grave breaches. Thus, a decision to prosecute a present alien suspected for having committed these crimes abroad could be regarded as an exercise of exorbitant jurisdiction if based on these conventions. But the prosecution in such circumstances could be based on other grounds of jurisdiction as it will be demonstrated in [ 2.3.2]

It becomes apparent and safe to exclude extradite or try clause when discussing universal jurisdiction.<sup>62</sup>

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Kingdom should either extradite[to Spain] or take proceedings against offending officials found in its jurisdiction” Pinochet 1,1A.C.61,83( H.L1998).

<sup>61</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug.12,1949, 6 U.S.T. 3114, 75 U.N.T.S.31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 6 U.S.T. 3217, 74 U.N.T.S.85; *Geneva Convention Relative to the treatment of Prisoners of War*, Aug. 12,1949,6 U.T.S.3316,74 U.N.T.S.135; *Geneva Convention Relative to the Protection of Civilian Persons in time of War*, Aug 12,1949,6 U.S.T.3516, 75 U.N.T.S. 287 ( hereinafter Geneva Conventions); *Protocol Additional to the Geneva Conventions of Aug.12,1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol 1),UN.GAOR,32 ed Sess, Annex 1, at 10, U.N.Doc A/32/144 (1977).

<sup>62</sup> Benavides, *ibid* 26,amply demonstrates the difference between universal jurisdiction and the maxim extradite or prosecute.p.32-36.

### 2.3.2 May universal jurisdiction be delegated?

Many prominent scholars<sup>63</sup> claim that the obligation to extradite or prosecute has evolved into international customary law with regard to serious international crimes. Hence, all states have an affirmative obligation to prosecute alleged criminals present on their territory, provided that no other state requests the offender's extradition. The proposition implies that the exercise of jurisdiction in such event is mandatory and accordingly the invalidity of the term obligatory territorial jurisdiction.

This construction has been promoted and furthered, amongst others, by the Institute of International Law which suggests that:

“Unless other wise lawfully agreed, the exercise of universal jurisdiction shall be subject to the following provisions:[...]C) Any state having custody over an alleged offender should, before commencing a trial on basis of universal jurisdiction, ask the state where the crime was committed or the state of nationality of the person concerned whether it is prepared to prosecute that person, unless these states are manifestly unwilling or unable to do so.”<sup>64</sup>

It is difficult to subscribe to this assumption for three main reasons:

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<sup>63</sup> Lee Steven, *ibid* 51, opined that “[c]urrent customary international law suggests that states now have an affirmative obligation to either exercise universal jurisdiction and prosecute perpetrators of serious international crimes such as genocide or extradite them to a country or international tribunal that will prosecute them.” p.430. The ICTY Appeals Chamber in *Blaskic Case* stated that “The national jurisdiction of the states of Ex-Yugoslavia, as those of other states, are required by customary law to judge or to extradite those persons presumed responsible for grave breaches of international humanitarian law “The Decision of the ICTY of 29 October 1997, Case IT-95-14-AR, para 29.

<sup>64</sup> The Institute of International Law, Seventeenth Session, *Universal Jurisdiction with Regard to Crimes of Genocide, Crimes against Humanity and War Crimes*. August 26, 2005. available at [http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf) (last visited 12.06.2006).

First, there exists no consistent state practice expressing *opinion juris* to support the claim. Moreover, even when the clause is agreed upon as a conventional obligation, many states fail to implement the clause in timely fashion, or if they enact the necessary incorporating legislation they restrict its application<sup>65</sup>.

Second, even if the extradite or prosecute scheme becomes a customary rule, it does not directly imply universal jurisdiction, because it does not in itself dictate which bases of national jurisdiction a state can exercise<sup>66</sup>.

Third, even if one agrees *arguendo* to this claim, the jurisdiction of the *loci deprehensios* derives from that of the other state which has the direct link to the crime and possesses the original competence to judge it. That is to say, the latter delegates its primary territorial, protective or nationality jurisdiction to the forum state by means of express assent or by not demanding the offender's extradition.

Thus, the forum state is acting as a representative of the aforesaid state in exercising a classical jurisdictional basis which by no means could be denominated universal. The same argument holds true for the incorrectly labelled delegated universal jurisdiction, for what is delegated in such case is a territorial, nationality or protective jurisdiction, but not a universal jurisdiction.

Theoretically, there could be one application where such jurisdiction could not be characterized as representative. That is where the custodial state offers to the other state the opportunity to prosecute, but the latter declines to take over the case, and in addition to that it denies the forum state's right to entertain the proceedings.

Such hypothesis is unlikely to materialize in today's world where states, as long as they have functioning criminal justice system, are overly protective and they would not allow others to judge acts they deem solicitude worthy. Nevertheless, should such case occur, the forum state could validly premise and justify its jurisdiction by virtue of objective territoriality and protective principles because the alternative to not prosecuting the

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<sup>65</sup> Only in 1993 Belgium adopted the Act to implement the 1949 Geneva Conventions and Additional Protocols, and it did not implement the Genocide Convention until 1999, while article V thereof obliges states to enact the necessary legislation. For more instances see A. Cassese, *ibid* 36.p.305-6.

<sup>66</sup> Inazumi, *ibid* 56.p.141.



alleged international criminal would be to award him a *de facto* asylum<sup>67</sup>, which is an indefensible outcome in any functioning legal order<sup>68</sup>. Moreover, harbouring such criminals may entail stigmatization and unbearable political pressure on the concerned state.<sup>69</sup>

In sum, even if one considers that the duty to extradite or prosecute has turned into an international customary norm, it is still a vicarious jurisdiction which is different from the universality principle.

One commentator persuasively articulated this difference, he observed that:

“The norms based upon the principle of vicarious administration of justice are to be differentiated from those arising from the principle of universality, since the ability to prosecute under vicarious administration is dependent on the liability to punishment at the site of the offence and on the question of extradition, which is not the case under universal jurisdiction. This stems from the fact that each principle pursued a different objective. The principle of vicarious administration of justice allows another

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<sup>67</sup> The U.N General Assembly adopted in 1973 a resolution rejecting the grant of asylum to persons accused or convicted of war crimes and crimes against humanity. *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A.Res 3074 (XXVIII), U.N.GAOR,28th Sess., Supp.No.30, at 78, U.N.Doc, A/9030 (1973).

<sup>68</sup> The Bavarian Supreme Court in the case of *Djajic*, accused of genocide in Bosnia and Herzegovina, in addressing the jurisdictional question declared that “Considerations of international law are important, but one should not overlook the fact that the prosecution of a foreigner for crimes committed abroad also serves an interest of the state of residence, namely not to become a refuge for offenders who have committed crimes under customary and conventional international law. Not to prosecute would undermine the trust of the German citizens in the national and international legal order” .L. Reydams, *ibid* 1.p.151. The same concerns were expressed in the Netherlands in the discussions regarding the implementation of article 5 of the Torture Conventions, observations in the parliamentary records(quoted in the initial report of the Netherlands to the Committee Against Torture, it was considered that “A veritable shock wave would go through the Dutch legal order if, faced with the presence in this country of a foreign national recognized as a torturer by witnesses and victims, the court were to declare themselves incompetent to hear the case.”.Reydams,*ibid*1.p.169.

<sup>69</sup> Libya was forced by the international community to surrender two of its nationals suspected of the Lockerbie accident. Under similar pressure and threats of withholding financial assistance Yugoslavia surrendered Milosevic to the ICTY and recently Nigeria, with the consent of his national state, handed over the former president of Liberia Mr Charles Taylor to the Special Court of Sierra lone.

state to enforce a criminal law norm which the original state itself could have enforced, whereas a state enforces a criminal law norm under the principle of universality because the world community has determined the offence to be generally punishable.”<sup>70</sup>

The German Penal Code in Section 7(2) (2)<sup>71</sup> lays down the principle of representative administration of justice which confers jurisdiction on the German authorities in case where requests of extradition are not made or rejected, or because extradition is not feasible. The law recognizes this form as a discrete ground of jurisdiction different from the universal one.<sup>72</sup>

The delegation of jurisdiction is not unknown notion in international criminal law, albeit in contractual fashion. For instance, it constitutes the jurisdictional competence of the ICC as it is delegated to it by states- parties and of member states of the European Convention on the Transfer of Proceedings in Criminal Matters.<sup>73</sup>

Finally, after illuminating the other forms of jurisdiction frequently confused with the principle in question, what remains is the essence of what could rightly be called

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<sup>70</sup> Rudiger Wolfrum, *The Decentralized Prosecution of International Offences Through National Courts*, in Yoram Dinstein and Mala Tabory eds, *War Crimes in International Law*(Martinus Nijhoff Publishers, 1996) p 236.

<sup>71</sup> . Reydams, *ibid* 1 p 143.

<sup>72</sup> The vicarious jurisdiction was recently practiced in Germany with regard to a complaint filed by the American Centre for Constitutional Rights, on November 30, 2004, against the American Minister of Defence Rumsfeld, the former CIA Director Tenet and U.S military personnel for allegedly committing acts of torture in the Iraqi prison Abu Gharib. The complaint was dismissed by the federal prosecutor on February 10, 2005, The German prosecutor referred to the principle of complementarity and concluded that there were no indications that the U.S had refrained or would refrain from investigating the alleged offences, available at :

[http://www.ccr-ny.org/v2/legal/septemper\\_11th/doc/German\\_prosecutor\\_Decision2\\_10\\_05.pdf](http://www.ccr-ny.org/v2/legal/septemper_11th/doc/German_prosecutor_Decision2_10_05.pdf).  
(last visited Feb 12, 2006)

<sup>73</sup> Article 2(1) provides that “[f]or the purpose of applying this Convention, any Contracting State shall have competence to prosecute under its own criminal law any applicable.” The European Convention on Transfer of proceedings in Criminal Matters. March.30, 1978. Europ.T.S.No.73. For more examples of delegation of jurisdiction see Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*. 1, J. I. C. J.(2003). p 627-634.

universal jurisdiction. In this writing the term universal jurisdiction will be used to describe “the right of a state to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim.”<sup>74</sup>

## 2.4 Universal jurisdiction and *jus cogens*, *obligatio erga omnes*

Many scholars<sup>75</sup> vigorously postulate that the categorization by the international community of specific acts as serious international crimes has attained the status of peremptory norm. Accordingly, the exercise of universal jurisdiction to prosecute their perpetrators has *ipso facto* elevated to *erga omnes* obligation toward the whole international community. The acceptance of this position would tantamount to declaring the exercise of the principle as a customary international rule incumbent upon every state.<sup>76</sup>

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<sup>74</sup> *Brussels Principles against Impunity and For International Justice*, Principle 13 available at <http://www.iccnw.org/documents/BrusselsPrinciples6Nov02.pdf?PHPSESSID=bd9a11feb4e61458ef2b6cc5663d905c> (last visited 12.06.2006)

<sup>75</sup> Bassiouni, *ibid* 50, declared that “the writings of the most distinguished publicist also support the proposition that *jus cogens* crimes [which include war crimes, genocide, crimes against humanity] require the application of universal jurisdiction when other means of carrying out the obligation deriving from *aut dedere aut judicare* have proven ineffective.” See also Randall, *ibid* 12, views that “Once an offence rise to an international crime it is ipso facto subject to universal jurisdiction”.p.381.

<sup>76</sup> The ICTY in the *Furundzija case* declared that “one of the consequences of the *jus cogens* character bestowed by international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish[...] individuals accused of torture[...] indeed it would be inconsistent on the one hand to prohibit torture to such extent as to restrict the normally unfettered powers of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad.”

Prosecutor v. Furundzija, Case No.IT-95-17/1-T, The ICTY Trial Chamber II, Judgment of 10 December 1998, para 156. See also Andrea Bianchi, *Immunity v. Human Rights: The Pinochet Case*, he argues that

The advocates of this claim rely on the dictum of the ICJ in the *Barcelona Traction* case. The court held that:

“[a]n essential difference should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>77</sup>

The construction of imperative law is evidently extraneous to the positivist doctrine which denies any obligation that is not deliberately agreed upon or accepted by states. There is no international instrument defining and recognizing the existence of these rules, and it could not be argued that such undefined norms<sup>78</sup> could or have become customary international law in respect to jurisdictional grounds for the lack of practice.<sup>79</sup>

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the Tadic judgment justifies states in taking jurisdiction on the basis of universality principle, 10, EJIL (1999) p. 245.

<sup>77</sup> *Barcelona Traction, Light and Power Co Ltd. (Belgium v. Spain)*, 1970 I.C.J. report, p. 32

<sup>78</sup> . A. Rubin, *Actio Popularis, Jus Cogens and Offences Erga Omnes?* noticed that it is not clear whether the restrictions on jurisdiction to adjudicate are part of jus cogens. 35 New Eng.L.Rev.(2001).p.269.

<sup>79</sup> In 1988 in the *Committee of United States Citizens Living in Nicaragua v. Reagan* the D.C Circuit Court of Appeal declared that to qualify as *jus cogens*, a norm should “to become a rule must first become a rule of customary law, which occurs when the extensive and uniform practice of individual nations reveals their willingness for the rule to become a law. A customary norm evolves into peremptory norm when the international community as a whole recognizes that the norm is one that permits no derogation.”, quoted in Jodi Horowitz. *Regina v. Bartle and the Commissioner of the Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*. 23 Fordham Int’l.L.J. (1999.2000).p.508.

The proposition attributes an aura of sanctity to the argument,<sup>80</sup> but does not reconcile with the international law, which as it currently stands rejects this assumption in respect of jurisdiction. That is evidenced by the International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) which in article 41(2) contemplates the consequences of serious breach of a *jus cogens* norm, it limits the consequences to “[n]o state shall recognize as lawful a situation created by a serious breach[...] nor render aid or assistance in maintaining that situation”, and it does not mention any *erga omnes* obligation to prosecute or a duty to exercise universal jurisdiction.

Furthermore, the putative overriding status of the peremptory rules<sup>81</sup> is unsupported by any case law.

In the South West Africa judgement the ICJ held that:

“[h]umanitarian consideration may constitute the inspiration basis for rules of law [...]. Such considerations do not, however, in themselves amount to rules of law. All states are interested-have interest- in such matters. But the existence of an ‘interest’ does not itself entail that this interest is specifically judicial in character.”<sup>82</sup>

This pronouncement has been borne out by the court’s decision in the *Arrest Warrant case* by not recognizing the prohibition of serious international crimes as of superior and overriding status over any other principles<sup>83</sup>. The court weighted the underlying

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<sup>80</sup> The ICTY declared that “[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.” Prosecutor v. Tadic, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453, at 483.

<sup>81</sup> Andrea Bianchi, *ibid* 76, stated that “ If one characterizes the prohibition of torture as a *jus cogens* norm, the inevitable conclusion is that no other treaty or customary law rule, including the rules of jurisdictional immunities, can derogate from it.” P.245.

<sup>82</sup> *South West Africa* (1966) 50, printed in *Reports of Judgments, Advisory Opinions and Orders, ICJ* (1966).

<sup>83</sup> Judge Al-Khasawneh addressed the question of the *jus cogens* hierarchy, he declared that “[e]ffective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seek to protect and enhance.

value of these rules from which, supposedly, no derogation is permissible, against those of immunity which are amenable to waiver and renouncement. The court sided with the latter by upholding the immunity of the Congolese Minister from prosecution for the callous and atrocious crimes he allegedly committed. In this regard the judgment could be interpreted as denying the contended supreme rank of the prohibition of war crimes and crimes against humanity.

The national jurisprudence of the majority of states provides a plethora of evidence to refute the alleged *jus cogens* rationale<sup>84</sup>. Many courts have ruled in favour of immunities and statutory limitations in well known cases involving the perpetration of the most appalling crimes known to mankind.<sup>85</sup>

The sphere of the *jus cogens* rules' application is accepted to limit states' power to enter international agreement which is otherwise unlimited<sup>86</sup>. Therefore, in itself does not order states to exercise their criminal jurisdiction<sup>87</sup>.

In any case, the Barcelona Traction decision is applicable only to the parties in that particular dispute<sup>88</sup> and as a general rule judicial precedents are only subsidiary source of international law.<sup>89</sup>

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Therefore, when this hierarchically higher norms comes into conflict with the rules of immunity, it should prevail.” *The Arrest Warrant Case, Judge Al-Khasawneh dissenting opinion*, para.7.

<sup>84</sup> A prominent example is the case of Ariel Sharon who has never been tried in Israel, party to the Genocide Convention, for his complicity in genocide after that his responsibility was proved by an official Israeli commission of inquiry for the crimes committed against Palestinian refugees in Lebanon in 1982. The crimes were condemned by the UNGA as “an act of genocide”. Furthermore, when proceedings were initiated against him in Belgium, both Sharon and the state of Israel intervened in the case which was finally dismissed because he was not present in Belgium and for his immunity as a prime minister. L.Reydams, *ibid*.p.117

<sup>85</sup> Jodi Horowitz, *ibid* 79, quotes the *Siderman Case* where the 9<sup>th</sup> Circuit found that torture is *jus cogens* violation, but still granted impunity for acts of torture.

<sup>86</sup> . Article 53 Vienna Convention on the Law of Treaties, *ibid*, 58.

<sup>87</sup> Christopher C. Joyner’ *Arresting Impunity: The Case of Universal Jurisdiction in Bringing War Criminals to Accountability*, observed that “ International law has traditionally distinguished the *Erga Omnes* and *Jus Cogens* doctrines from Universal jurisdiction, as both the former principles pertain to state responsibility, while the latter concerns violations of individual responsibility”.59. *Law & Contemp. Prob.*(1996).p. 169.

<sup>88</sup> Article 59 of the I.C.J Statute.

<sup>89</sup> Alfred Rubin, *Is International Criminal Law Universal?* U Chicago Legal Forum (2001)p 169.

However, even if all states have a legal interest in a state's discharge of its obligation to punish certain crimes that does not necessarily mean that other states also have jurisdiction over that crime.<sup>90</sup>

## 2.5 Universal jurisdiction and state sovereignty

Universal jurisdiction differentiates from other bases of jurisdiction by not being premised on the notion of sovereignty and its exercise can be construed as an encroachment on the sovereignty of the state where the offence occurred or of the home state of the perpetrator or the victim.

Sovereignty mirrors *realpolitik* and it would be invoked to argue that universal jurisdiction in essence contradicts the basic notion of state sovereignty as it is enshrined in the canons of international law as expressed in article 2.1 UN charter.

Each sovereign state bears the responsibility to judge international crimes perpetrated within its respective territory. In this respect sovereignty constitutes the linchpin of international criminal law. Sovereignty means that every state must have the opportunity to practice its jurisdiction domestically and not to be stripped of that right by other sovereigns claiming the exercise of universal jurisdiction. Should the national system within a given state break down rendering the state no longer physically able to wield sovereign authorities over its territory and population, then the assertion of jurisdiction over international crimes committed by whomever within the territory of the ravaged state or elsewhere by its nationals would be desirable. For instance, Bosnia-Herzegovina and Rwanda hailed the prosecution of their nationals in Germany and Belgium.

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<sup>90</sup> Gabriel Bottini, *Universal Jurisdiction after the Creation of the International Court*. 36.N.Y.U.J.Int'l.L&Pol (2004).p.519.

Some argue that this conservative interpretation of sovereignty is no longer applicable and that the official position of a person does not shield him from personal criminal responsibility. That is underscored by the decision of the House of Lords to extradite Pinochet to Spain and Milosevic's trial before the ICTY. They argue that these cases represent an evolution of international law and reflect a shift of priorities, namely that more weight is given to key humanitarian values and less to the traditional interpretation of state sovereignty.<sup>91</sup>

The claim contradicts state practice which suggests that the reasons for their refrain from exercising the principle are related to reciprocal respect for each other's prerogatives<sup>92</sup>. Indeed, even if the exercise of universal jurisdiction targets individuals, judging the act of an individual may imply, especially when the suspect is an agent of a foreign state, the responsibility of his state.<sup>93</sup>

The American and Israeli fierce reactions to the Belgian exercise of universal jurisdiction evidence that the principle is still perceived as a violation of state sovereignty. The USA threatened to cut its financial contribution to a new NATO headquarter in Brussels<sup>94</sup> in response to proceedings initiated against its former

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<sup>91</sup> Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*. 8. M.S.U.D.C.L Int'l.L.J.(1999).P.612.

<sup>92</sup> Benavides, *ibid*26.p 41, quoting Graeffrath Bernhard, *Universal Criminal Jurisdiction and an international Criminal Court*, E.J.I.L, Vol 1, No.1-2,1990 stated that "To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind[...]Fundamentally [they] based their position on the principle of sovereignty". See also the opinion of lord Slynn in the Pinochet case; he stated that "Adjudicating, through universal jurisdiction, upon acts committed by public officials within their own territories breach a sound principle of judicial restraint and abstention, which governs the consideration of foreign sovereigns' acts of states." Pinochet 1 at 86. See also L. Reydam, *ibid* 1. referring to the preparatory work of the Genocide Convention which illustrates how states regarded any form of extraterritorial jurisdiction as threat to their sovereignty, p.47-53.

<sup>93</sup> Inazumi, *ibid*.56,p137.

<sup>94</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*. Harvard Int'l. L.J. Vol 45, Nov 1(2004).p.189.



president Bush. With the same level of seriousness Israel reacted towards Sharon's indictment for crimes against humanity and violations of the Geneva Conventions.<sup>95</sup> In the *Arrest Warrant Case* the Congo considered the Belgian exercise of universal jurisdiction as a 'coercive legal act' violating its sovereignty, and it raised the same contention against France in the *Case Concerning Certain Criminal Proceedings*.<sup>96</sup> Under this immense pressure Belgium, in 2003, was forced to repeal the law and its extraterritorial jurisdiction has become very limited.<sup>97</sup>

Judge Van den Wyngaert<sup>98</sup> expressed the view that it is not for sovereignty reasons but for political convenience and practical considerations, such as the difficulty in obtaining evidence and the fear of overburdening their judiciary that states refrain from exercising universal jurisdiction.

This interpretation is dubious because states have or could have adopted within their national systems certain mechanisms in order to avoid political inconvenience, for instance by enacting procedural requirements to prevent overloading the systems and saving scarce resources by filtering out what appears to be frivolous or vexatious petitions.

The most accepted practice in this regard is to give the prosecutor a discretionary power to evaluate and decide whether the filed petitions are worth investigating and prosecuting.

To mention a few instances, the German Criminal Procedures Code<sup>99</sup> (new section 153 [f]) empowers the prosecutor to decide not to investigate situations when the alleged crime committed abroad by non-German and the alleged criminal is not present in Germany and there is no real chance of apprehending him.

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<sup>95</sup> The Israeli Foreign Ministry legal adviser contemplated trade boycotts and other retaliatory measures against Belgium. Ibid.

<sup>96</sup> *A Case Concerning Criminal Proceedings in France* (Republic of Congo v. France) (2003) available at <http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm> (last visited 12.06.2006)

<sup>97</sup> Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a sensible Notion of Universal Jurisdiction*. 1. J.I.C.J. (2003).p 589.

<sup>98</sup> Separate dissenting opinion of Judge Van den Wyngaert. Para. 56.

<sup>99</sup> Reydam, ibid 1. p.145.

In the Netherlands, where trials *in absentia* are frequent, only the prosecutor and not civil petitioners is empowered to bring prosecutions, and only in cases where he deems that expedient.<sup>100</sup>

The fact that sovereignty is increasingly losing ground is tangible in current international law, but when the issue of criminal jurisdiction is at stake, a state would not cede an important segment of its prerogatives to another state, that is because International criminal law is still driven by political as much as by legal considerations.

The extradite or prosecute mechanism evidences how states insist on retaining at their discretion the opportunity to preclude other states from adjudicating any acts they consider falling within the ambit of their sovereignty. The clause is designed to give priority to the jurisdiction of the state with the strongest nexus, over that of the custodial state. Hence, the former is competent to demand for the purpose of prosecution the extradition of the offender. And by so doing, it retains what it considers sovereign acts within its exclusive jurisdiction.

In conclusion, the exercise of universal jurisdiction, against the objection of the state where the offence took place or the offender's national state, has been opposed and construed as usurpation of the latter's authority to prosecute.

## 2.6 The ICJ decision on *the arrest warrant case*

The ICJ would have ruled on the issue of universal jurisdiction in the *arrest warrant case*, if the Congo had not abandoned in the final Memorial its contention to the legality of the universality principle as then exercised by Belgium. The court adhered strictly to the *non ultra petita* rule and decided not to address the issue of universal jurisdiction

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<sup>100</sup> The Dutch prosecutor dismissed a complaint lodged against the Former Chilean President Pinochet for torture, for reasons relating to public interests, citing the potential legal and factual difficulties the Dutch legal system would encounter. The dismissal was further held by Amsterdam's Court of Appeal in 1995. Reydam, *ibid* 1.p. 169.

under which the arrest warrant was based.<sup>101</sup> To judge the immunity issue, the court assumed that Belgium had jurisdiction under international law to issue and circulate the arrest warrant.<sup>102</sup>

Nevertheless, by analyzing the judgment one may infer two important pronouncements regarding the question of jurisdiction. First, the judgment expressly negates the exercise of universal jurisdiction where the alleged offender is immune under international law.

Second, the court held that:

“ [t]he immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecutions in certain circumstances: [...], after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other state. Provided that it has jurisdiction under international law”.<sup>103</sup>

The passage implies that the court by requiring the prosecuting state to have jurisdiction under international law has not viewed the exercise of extraterritorial jurisdiction as mandatory when the alleged offender is not present in the prosecuting state's territory. Indeed had the court found it compulsory, every state would have had the duty to prosecute non-present aliens, and the requirement for the jurisdiction to be valid under international law would be completely superfluous.

Fortunately, some of the judges entered declarations and separate and joint opinions expressing diametrically different opinions. Their opinions demonstrate the multiplicity and divergence of the views among international law commentator regarding universal jurisdiction and the difference between scholars and state practice on the other hand. The opinions, though are *obiter dicta*, contribute significantly to the discussion over universal jurisdiction's existence and legality. The judges expressed two different opinions:

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<sup>101</sup> Judgment, para.41-43.

<sup>102</sup> Ibid, para. 46.

<sup>103</sup> Ibid, para.61.

First, President Guillaume studiously took a positivist view. After analyzing the practice of several states; he convincingly concluded that except for piracy the “[u]niversal jurisdiction *in absentia* is unknown to international law.”<sup>104</sup> The same stance was taken by judges Ranjeva<sup>105</sup> and Rezek<sup>106</sup>.

Second, Judges Higgins, Kooijmans and Buregenthal opined that the exercise of universal jurisdiction is permissible, but that permissibility is subject to a set of conditions, among which:

“A state contemplating to bring charges based on universal jurisdiction must first offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned”<sup>107</sup>

The application of the judges’ suggestion could be controversial from the point of view of separation of powers doctrine because it ultimately implies the shifting of the whole matter from the judiciary to the executive branch which would be the foreign minister in this case.

Moreover, due to lack of incentives, it is unpersuasive to require a state to first use its judiciary resources in investigating and indicting an alleged criminal, and subsequently offer his national state the opportunity to try him. It is unimaginable that such eventuality would occur simply because states do not prosecute in magnanimous and altruistic manner.

The opinion of President Guillaume appears more convincing and reconcilable with the practice of states.

All the judges extensively analyzed the international conventions and surveyed state practice and agreed that:

“[n]on of the [national laws], nor the many others that have been studied by the court represent a classical assertion of universal jurisdiction over particular offences committed elsewhere by persons having no relation or connection with the forum state.”<sup>108</sup>

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<sup>104</sup> Separate opinion of President Guillaume para 9.

<sup>105</sup> In his separate opinion judge Ranjeva opined that universal jurisdiction *in absentia* is impermissible. para 8-12.

<sup>106</sup> Separate opinion of judge Rezek. para. 10

<sup>107</sup> Joint Separate Opinion, *ibid* 10, para 59.

## 2.7 Conclusion

We have seen that scholars and courts lump together several forms of extraterritorial jurisdiction without delimiting the respective ambit of each of them, and how this attitude results in describing improperly some forms as universal in circumstances where the custodial state's jurisdiction is obligatory territorial jurisdiction deriving from a treaty. Alternatively, absent a treaty, it is a subordinate to the jurisdiction of whether the territorial or the nationality state, whose competence takes precedence over that of the prosecuting state.

The principle as its proponents advocate stands at loggerheads with the notion of state sovereignty and that could not be mended by the implausible argument of imperative law.

As such, the thesis will in the following seek to verify the principle's acceptance and legitimacy in its own right, by examining whether it can be invoked as a free-standing basis, in a given case, where there exists no other ground of jurisdiction. That will be conducted by discussing the emergence of the principle followed by the provisions of the international conventions.

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<sup>108</sup> Ibid, para.21. See also the opinion of President Guillaume, *ibid* 104,para.12.

### **3 The Historical Record of Universal Jurisdiction**

#### **3.1 Background**

The majority of scholars use a standard formula to explain the provenance and development of universal jurisdiction; it starts with an analogy to piracy, followed by citing various trials of world-war criminals in international and municipal tribunals.

For its importance as a precedent and as being the only offence subject to universal jurisdiction by virtue of multilateral convention, piracy will be analyzed at some length. Thereafter, the research will view the trials frequently cited as precedents and justification for the expansion of the universality principle to find if the extension of its application to human rights crimes can be sustained on these basis.

#### **3.2 The piracy analogy**

Universal jurisdiction emerged in the context of piracy which state practice has recognized as universally cognizable and empowered every state to capture and prosecute pirates who happen to fall under its authority. This practice was restated in article 105 of the Convention on the High Seas which stipulates that:

“On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon penalties to be imposed, and may also

determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith<sup>109</sup>”.

Scholars and courts have sought to establish the legitimacy of universal jurisdiction by invoking piracy as the historical precedent and justification for the principle’s extension to modern international crimes by maintaining that the notion of sovereignty has long co-existed with universal jurisdiction<sup>110</sup>.

This argument was first utilized by The Nuremberg and Tokyo tribunals for the lack of precedents. In 1961 The Israeli Supreme Court discussed and attached a great importance to the piracy as a precedent in the Eichmann trial, it stated that:

“[t]he basic reason for which international law recognizes the right of each state to exercise such jurisdiction “universal” in piracy offences [...] applies with even greater force to the above-mentioned crimes ‘crimes against humanity.’”<sup>111</sup>

This analogy overlooks the peculiarities of piracy that have made it subject of universal jurisdiction; those traits rendered the prosecution of pirates by any state consistent with the fundamental principle of state sovereignty. In contrast, human rights related crimes do not have some or all those characteristics and thereby the analogy to piracy appears to be flawed as it will be set out hereunder.

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<sup>109</sup> *Convention on the High Seas*, 10 Dec, 1982, available at:

[www.un.org/Depts/los/conventions\\_agreements/texts/unclos/part7.htm](http://www.un.org/Depts/los/conventions_agreements/texts/unclos/part7.htm), (last visited April .03,2006)

<sup>110</sup> Randall, *ibid*, 12, stated that “The concept of universal jurisdiction over piracy has had enduring value, by supporting the extension of universal jurisdiction to certain modern offences somewhat resembling piracy” p.798 and that “[T]he legitimacy of extending universal jurisdiction over the Axis offences logically may depend upon the strength of the analogy between those offences and piracy”.P.803.

<sup>111</sup> *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277,299,304 (Isr.S.Ct. 1962).

### 3.2.1 Why piracy was accepted as an exception to the traditional jurisdictional bases.

#### 3.2.1.1 The lack of state authorization

Article 101(1) of the Convention on the High Seas defines piracy as “Any illegal act of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship in a private aircraft.”

The decisive factor is not that pirates conducted their crimes as private actors, but that they often acted against the interest of their own state of nationality and thereby, purposely waived its protection.

Pirates in their heydays could easily legalize their business and secure the interference and protection of their home state by applying for a writ of *marque* and became a privateer authorized to attack and seize civilian ships on the high seas with the only pledge of not to attack the ships of their home state and to share the proceeds with its authority.

In cases of piracy the ‘victim’ state whose vessels, nationals or interest had been harmed by the crime would have had no opportunity to attain reparation since pirates acted for private ends and no state could be held responsible for their crimes, by the same token, the prosecuting of pirates would not violate any other state’s sovereignty since they were acting without sovereign authorization.

The situation is completely different in the case of international crimes which are invariably conducted by public officials, or at least with their connivance or acquiescence, and in this respect their state would incur the responsibility for their crimes. Therefore their prosecution could be established on one of the traditional jurisdictional bases, either by their own national state or by the national state of the victims or by the state in whose territory the alleged crimes took place.

For this particular reason the piracy has been accepted as an appropriate subject for the application of universal jurisdiction because it excluded state’s political conduct from its purport and as a result its application could not endanger inter-state relations, this particular paradigmatic rationale does not apply to the crimes to which universality advocates seek to extend.



### 3.2.1.2 The odiousness of piracy

The piracy analogy is fundamentally predicated on the assumption that universal jurisdiction over piracy has been based on its heinousness, and suggests that international law has always recognized as an exception to standard jurisdictional bases, the prosecution of outrageous crimes. Thus, war crimes, crimes against humanity, genocide which are egregiously heinous would be legitimately subject to this principle and thereby universally cognizable<sup>112</sup>.

The history of piracy shows that the crime was never regarded as extraordinarily heinous because states have accepted as legal enterprise the same acts of the pirate when those acts were conducted by a privateer and international law recognized the right of every sovereign to authorize this type of approved plundering and states respected the system by not interfering and prosecuting each other's privateers when they acted in the high seas, so the kind of revulsion attached to piracy is different from that of modern international crimes which are absolutely egregious and unjustifiable.

### 3.2.1.3 The *locus delicti*

The majority of scholars emphasize the importance of the high seas locus in establishing universal jurisdiction over piracy<sup>113</sup>. They argue that since no state has jurisdiction over international waters, traditional grounds of jurisdiction do not apply and universal jurisdiction becomes necessary tool to fill in this unique legal vacuum.

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<sup>112</sup> Randall, *ibid* 12, p 193 maintained that the sole rational for the universal jurisdiction is the fundamental nature of the crime.p.193, he cited the Second Circuit's statement in *Filartiga v. Pena-Irala*, which involved acts of torture in Paraguay by one Paraguayan against another, the court ruled that "[T]he torturer has become- like the pirate and slave trader before him- *hostis humani generis*, an enemy of all mankind' 630 F. 2d 876 (2d Cir.1980).

<sup>113</sup> Anthony Summers "*The Under-Theorized Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts*" he opined that "[n]ations predicate their formulation of universal jurisdiction over piracy on the notion that the crime usually committed in *terra nullius* such as on the high seas where no nation exercised territorial control." 21 *Berkely J.Int'l L.* (2003).p126.

The flaw in this account is that irrespective of where its place of commission, piracy harms ships that falling within the territorial jurisdiction of the flag state, and both the pirates themselves and their victims could have been within the jurisdiction of their national state.

The real problem was not the jurisdictional status of the high seas as a place of commission but the fact that no state had on the spot control due to the vastness of the seas that rendered piracy as such an easy crime to commit and to escape<sup>114</sup>. These factors necessitated the exclusive jurisdictional treatment of the crime. Therefore, the universal jurisdiction over piracy was a useful concept because it was used as an evidentiary rule to facilitate the proof of jurisdiction in cases where the forum state had substantial connection to the crime.

Accordingly, it could be argued that the exercise of jurisdiction by states over pirates belongs to the category of territorial jurisdiction over persons for extraterritorial events<sup>115</sup>. That is supported by state practice which recorded only three cases of jurisdiction over accused pirates being exercised in the absence of a link to some territorial basis for jurisdiction other than universal jurisdiction since 1705.<sup>116</sup>

Yet the new universal jurisdiction does not use the universal jurisdiction principle as merely an evidentiary rule, but it seeks to apply it specifically where there is no nexus and in cases that do not share the core features that made piracy suitable for universal jurisdiction.<sup>117</sup>

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<sup>114</sup> E. Kantorovich, *Positive Theory of Universal Jurisdiction*, 80, Notre Dame L. Rev Nov (2004) p.7.

<sup>115</sup> A. Cassese, *When May Senior State Officials Be Tried For International Crimes? Some Comments on the Congo v. Belgium Case*, 13 AJIL.853 (Sep 2002).p. 857. The same opinion was expressed by Grotius, he wrote that “[t]he flag state should be able to exercise its jurisdiction over non-national ships and persons for acts of piracy. It was not application of universal jurisdiction, but it could be said that it was recognition of the universal application of the flag state’s jurisdiction”. Cited in Bassiouni, *ibid* 50,p.109.

<sup>116</sup> A .Rubin, *The Law of Piracy* (2ed 1998).p.345.

<sup>117</sup> Kantorovich, *ibid*, 114.p.7.

### 3.3 The Post-War Tribunals

Some post-Second World War trials are extensively cited as the first modern precedents of the exercise of universal jurisdiction and as an authoritative justification of its application to international crimes<sup>118</sup>.

#### 3.3.1 International Tribunals

##### 3.3.1.1 The International Military Tribunal

The Nuremberg Tribunal (IMT) was created by the London Agreement to try the major war criminals for crimes against peace, crimes against humanity and war crimes. Its Charter and judgment were unanimously reaffirmed by The UNGA<sup>119</sup> and endorsed by the UNSG in 1949. he stated that:

“[i]t is possible and perhaps[...] probable, that the [IMT] considered the crimes under the charter to be, as international crimes, subject to the jurisdiction of every state.”<sup>120</sup>

The IMT usually referred to other basis of jurisdiction, but in the Judgement one ambiguous reference to universal jurisdiction was made:

“The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done what any one of them might have done singly: for it is not to be doubted that any nation has the right to set up special courts to administer law”.<sup>121</sup>

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<sup>118</sup> The Sixth Circuit court in *Demjanjuk v. Petrovsky*, ruled that “It is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction” 776 F.2d 571, 582(6<sup>th</sup> Cir.1985), cited in Randall, *ibid* 12.p.505.

<sup>119</sup> *Principles of international law recognized by the charter of Nuremberg Tribunal and the judgement of the tribunal.*” G.A.Res.95.UN.Doc.A/64/Add.1, at 188(1946).

<sup>120</sup> . The Charter and Judgement of The Nuremberg Tribunals 80,UN.Doc.A/CN.4/5,UN.Sales No.1949 V.7(1949) (Memorandum submitted by the Secretary General).

<sup>121</sup> IMT Judgment and Sentences, Oct 1, 1946, *reprinted* in 41 Am. J. Int’l L. 172, 216-17 (1946) .

Many commentators<sup>122</sup> relied on this single passage to claim that universal jurisdiction may be inferred from the words ‘any nation’ which they interpret as giving every nation even in absence of any nexus to the crimes, the right to prosecute international crimes, and they regard the general assembly resolution as a codification of the jurisdictional rights of all states to prosecute the crimes enumerated in the IMT charter.

This presumption does not comport with the history of the tribunal, despite its vague reference to universal jurisdiction, the tribunal was established by the Allies who had taken the sovereign authorities of Germany. This transfer of sovereignty was explicitly recognized in the Berlin Declaration where the Allies:

“[a]ssume supreme authority with respect to Germany, including all the powers possessed by the German Government, The Command and any state, municipal, or local government or authority.”<sup>123</sup>

Thereby, the trials were an exercise of national jurisdiction; this view was confirmed in the judgment:

“[t]he making of the Charter [establishing the Nuremberg Tribunal] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered: and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world”.<sup>124</sup>

### 3.3.1.2 The International Military Tribunal for the Far East

The consent of the Japanese Government constituted the jurisdictional basis for the IMTFE, because unlike in Germany the Allies recognized the Japanese government to remain in power as the formal authority over the Japanese territory. They proclaimed their intention to bring to trial the Japanese war criminals in the Potsdam Declaration:

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<sup>122</sup> Michael Scharf, *ibid* 16, considered the resolution as “[c]odifying the jurisdictional right of all states to prosecute the offences addressed by the IMT, namely war crimes, and crimes against humanity, and the crime of aggression.” P.371.

<sup>123</sup> Berlin Declaration, June 5.1945,stat.1649,1650

<sup>124</sup> IMT Judgment, at 218.

“[w]e do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals”<sup>125</sup>

The proclamation was unconditionally accepted by the government which undertook to “We hereby under take to[...]carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever actions may be required by the Supreme Commander for the Allies Powers[...]for the purpose of giving effect to that Declaration”<sup>126</sup>

If this so, it becomes clear that the court did not assert universal jurisdiction, rather its jurisdiction was consented to by the Japanese government.

### 3.3.2 National courts

The Allies tried under the Control Council Law No10 (Dec 20, 1945) non- major criminals by tribunals established and administrated by each of them in its respective territorial zone and they declared in the preamble of the London Agreement that:

“[t]he Moscow Declaration of 30 October 1943 on German atrocities in Occupied Europe stated that German officers and men [ ]who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries.”<sup>127</sup>

By and large, the prosecutions were an exercise of the belligerents’ right to punish the conquered belligerents; this fact was expressed by the American Military Tribunal in the *Alstoetter case* when it treated the question of universality. It declared that:

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<sup>125</sup> *Potsdam Declaration: A Statement of Terms for the Unconditional Surrender of Japan*, July 26, 1945 available online at [www.oxfordjapan.org/documents/postdam\\_declaration.html](http://www.oxfordjapan.org/documents/postdam_declaration.html) (Last visited 10.01.2006).

<sup>126</sup> . *The First Instrument of Surrender*, Tokyo Bay on the 2ed, Sep.1945. Available at: [www.yale.edu/lawweb/avalon/wwii/j4.htm](http://www.yale.edu/lawweb/avalon/wwii/j4.htm). (last visited (07.06.2006).

<sup>127</sup> . *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. London Agreement of 8 August 1945* reprinted in Yoram Dinstein and Mala Tabory ‘*War Crimes in International Law*’ .p.379.

“This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war, it has always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrator fall. The rules of international law recognized as paramount and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the state or in occupied territory, have been unquestioned”<sup>128</sup>

The prosecutions were conducted by the victorious belligerents or by the courts of the affected states by virtue of either the passive nationality or territorial jurisdiction<sup>129</sup>. Therefore, the courts did not feel the necessity to elaborate on the issue in their reasoning since they were exercising a traditional jurisdiction.<sup>130</sup>

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<sup>128</sup> The American Military Tribunal (1947). 14 NN.Dig.278,282-83.

<sup>129</sup> . Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*., considered that “The post-Second World War trials usually cited as examples of the exercise of universal jurisdiction in fact do not deserve this label.” 23 Hum. Rts. Q (2001).p.942.

<sup>130</sup> Bowett, *ibid.*34,p.12. See also the authoritative History of the United Nations War Crimes Commission and Development of the Laws of War, Compiled by the United Nations War Crimes Commission (London, 1948,at29). “[t]he right of the belligerent to punish as war criminals persons who violate the laws or customs of war is a well-recognized principle of international law. It is the right of which a belligerent may effectively avail himself during the war in cases when such offenders fall into his hands, or after he has occupied all or part of enemy territory and is thus in the position to seize war criminals who happen to be there[.] And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated state the obligation, as one of the provisions of the armistice or the Peace Treaty, to surrender for trial persons accused of war crimes.” Cited in A. Cassese, *ibid* 36.P.39.

### 3.4 The Trial of *Adolf Eichmann*

Eichmann was the responsible officer for the execution of the “Final Solution to the Jewish Problem”. He fled Germany and settled in Argentina where he was abducted by the Israeli Government to stand trial in Jerusalem in 1961.

He was accused under the Israeli Nazis and Nazis Collaborators (punishment) Act, law, for crimes against the Jewish people’ genocide’, crimes against humanity and war crimes. The crimes were committed before the creation of Israel in 1948.

The case was an evident exercise of the passive nationality and protective jurisdiction principles as they were expressed by the District Court of Jerusalem. It stated that:

“[i]f an effective link existed between the state of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has an indubitable connection with the state of Israel. The connection between the state of Israel and the Jewish people needs no explanation. The state of Israel was established and recognized as the state of the Jews.”<sup>131</sup>

In addition, Eichmann’s defence counsel contented that according to the *aut dedere aut judicare* principle, Israel was obliged to follow the course of extraditing him to Germany. By not doing so, Israeli had no right to try him. In addressing that the Supreme Court argued that the Government of West Germany refused the Appellant’s demand to be extradited to it, and therefore, an offer by the Government of Israel could be of no practical use.<sup>132</sup>

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<sup>131</sup> Eichmann case, at 52. Available at:

[http://www.nizkor.org/hweb/people/e/eichmann\\_adolf/transcripts/](http://www.nizkor.org/hweb/people/e/eichmann_adolf/transcripts/). (Last visited (10.01.2006).

<sup>132</sup> Ibid, The Israeli Supreme Court, at 12 (12).

It considered that the German Government by refusing the extradition demand had, as matter of actual fact, consented to the trial in Israel and that could be interpreted as a waiver of whatever contentions it could bring against the jurisdiction.<sup>133</sup>

Thus, the universality principle was not the sole or the basic ground for the Israeli courts' competence, because that was premised on a set of grounds including two traditional bases. Therefore, the trial loses its value as a precedent of the principle's application<sup>134</sup>.

### 3.5 Conclusion

The universality principle has emerged and still applicable for piracy as a permissive evidentiary rule to confirm already existing territorial or nationality jurisdiction, but even as such it has been rarely practiced. This special jurisdictional treatment is justified by reasons related to the constitutive traits of piracy as such, which modern international crimes by their very own nature do not possess. This renders the subjection of the latter crimes to universal jurisdiction unsuitable and problematic. Therefore, it appears safe to declare the piracy analogy as inherently flawed and insufficient to sustain the argument of its proponents.

The post-war and Eichmann trials could not be and was not an exercise of universal jurisdiction.

In conclusion, these claimed precedents do not provide a tangible evidence for assuming that the principle had been exercised and extended to other crimes than piracy, in order to contend its legitimacy as customary international norm.

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<sup>133</sup> Ibid, stated that there is a "Limitation upon the exercise of universal jurisdiction [...] namely that the state in which has apprehended the offender must first offer to extradite him to the state in which the crime was committed [is] implicit in the maxim *aut dedere aut punire*" p.302.

<sup>134</sup> Bowett, *ibid* 34, considered the trial as highly unusual and probably unfounded.p.12.



## 4 International crimes and state practice

To determine whether the universality principle has been accepted and exercised, one has to examine the penal repression provisions of international criminal law conventions and how states interpret and apply those particular provisions.

### 4.1 Genocide

The text of Article VI of the Genocide Convention limits the jurisdictional competence to the territorial state or an international tribunal<sup>135</sup> and explicitly rejects the universality principle.

Despite this plain language, some commentators<sup>136</sup> and national courts have argued that states are permitted or even requested to exercise universal jurisdiction over the crime. To vindicate this argument some national courts have expressed the following contentions:

(i) Article VI regulation is not exhaustive because even if it does not mention other traditional jurisdictional grounds such as the active and passive nationality, it does not bar the right of any state to bring to trial before its own tribunals any perpetrator of

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<sup>135</sup> Article VI provides that "Persons charged with genocide or any other acts enumerated in article V shall be tried by a competent tribunal of the state in the territory of which the acts was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

<sup>136</sup> Ad hoc judge Lauterpacht expressed this view that "genocide as an international crime permits parties within their domestic laws to assume universal jurisdiction over the crime". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1993, at 443. In the same case Judge Kreca opined that the convention "does not contain the principle of universal jurisdiction." at.464.

genocide committed by or against its nationals, thus, in a similar manner states are entitled to practice the universal jurisdiction even if the convention is silent on that. The Spanish *Audiencia Nacional* adopted this view to justify the assertion of jurisdiction over the crime of genocide in the Pinochet case, it incorrectly declared that:

“[i]t would be contrary to the spirit of the convention-which seeks a commitment on the part of the Contracting Parties to use their respective criminal justice systems to prosecute genocide as a crime under international law, and to prevent impunity in the case of such crime”<sup>137</sup>.

This interpretation contradicts the wording of the convention which unlike some other conventions, it does not permit states to exercise in accordance to their national law any other ground of jurisdiction beyond those provided for in the convention<sup>138</sup>.

(ii) Many courts viewed that in most cases genocide would end up unpunished because the perpetrators are usually acting under the colour of state authority and against fellow countrymen. Therefore, the territorial state probably would be unwilling to prosecute them. This fact renders the assertion of universal jurisdiction a necessary venue to achieve the prevention and punishment of genocide.

This view, though logical, was opposed during the convention’s preparatory works<sup>139</sup>, and states have continued to reject it even after experiencing the manifest impotence of the mechanism adopted in 1948.<sup>140</sup>

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<sup>137</sup> Audiencia Nacional ember 1998. quoted in Reydams, *ibid* 1,p.185.

<sup>138</sup> . For instance the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Article 5 (3), “This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law”.

<sup>139</sup> Wiliam A. Schabas, *National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes’*. J.I.C.J.1(2003),p. 42.

<sup>140</sup> Whitaker Report enumerated the following instances of genocide since the entry into force of the convention “[t]he Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Ache Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978 and the contemporary Iranian killing of Bah’is” . *Revised and Updated Report on the Prevention and Punishment of the Crime of Genocide*, study by Mr. Benjamin Whitaker. UN Doc. E/CN.4/Sub.2/1985/6 (1958), at 9-10.

States' reluctance to accept any form of extraterritorial jurisdiction is evidenced by their rejection of the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities which appointed a Special Rapporteur to verify whether the circumstances were ripened to improve the deficiencies of the convention.

The Rapporteur suggested that to enhance the convention states are recommended to adopt through a revision of the convention or an additional protocol the clause of extradite or prosecute, but his judicious proposals were resolutely rejected<sup>141</sup>.

(iii) The Israeli Supreme Court invoked customary international law to reason its right to exercise universal jurisdiction over genocide in the Eichmann trial. But it seems preposterous to argue that the elements of custom can be present when negotiations intended at codification of international obligations, held little more than a decade earlier specifically rejected the norm<sup>142</sup>.

Drawing upon that it is more accurate to conclude that the convention and subsequent state practice do not sustain any expansion beyond article VI.

Nevertheless, few states have recently tried persons, domiciled in the prosecuting states, allegedly having committed genocide in the Former Yugoslavia and in Rwanda. Those trials are often referred to as a modern exercise of universal jurisdiction over genocide.

The following examples will suffice to prove that those trials were exercise of other grounds than the universality principle:

(i) Austria initiated in 1995 Criminal proceedings against a Bosnian Serb, *Dusko Cvjetokovic* for genocide committed in Kucice. To address the suspect's challenge to jurisdiction, the Regional Supreme Court (Linz) and subsequently the Supreme Court of Austria held that they are competent under domestic and international law and confirmed the applicability of Austria's vicarious jurisdiction according to the national

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<sup>141</sup> Ibid.

<sup>142</sup> .Schabas, *ibid.* 139.p.60.

Penal Code StGB §65 (1) (2) because the prosecuted acts are criminalized under the Austrian and Bosnian law and the extradition of the accused is impossible due to the ongoing war in Bosnia Herzegovina.<sup>143</sup> Similarly, in the case of *Djajic* the Bavarian Supreme Court based its jurisdiction on the same ground pursuant to the StGB§7 (2) (2) which provides of the vicarious jurisdiction.<sup>144</sup>

(ii) The assertion of jurisdiction was consented to and by the Rwandan and Bosnian authorities through their declaration that they had no interest in taking over the proceeding and thereby consenting to the jurisdiction of forum state, for instance to the German courts in the cases of *Jorgic* and *Djajic*.<sup>145</sup>

(iii) In the *Tadic* case an examining magistrate invoked the universal jurisdiction principle based on the presence of the suspect in Germany as well as other concurrent legal circumstances which might be considered as a reliance on the protective principle, he held that

“the crime of adding and abetting genocide coincides in the instant case with other serious offences which Germany is obliged to repress on the basis of international conventions [...] it would inconceivable that Germany, in spite of the allegations and the provisions of StGB§6(1), would leave in peace a person who is suspected of having committed the worst possible crimes in the conflict in Bosnia-Herzegovina and who has come voluntarily to Germany.”<sup>146</sup>

(iv) The Statutes of the ICTY and the ICTR recognize the concurrent jurisdiction of national courts<sup>147</sup> and the tribunals have declined to take over and commended trials in European countries, for instance in the cases of *Djajic* and *Jorgic* in Germany<sup>148</sup>,

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<sup>143</sup> The Article provides that “If the offender, though he was a foreigner at the time when he committed the offence, was found in this country and if, due to reasons different from the nature and characteristics of the offence is not extradited to a foreign state.” Cited in L. Reydam, *ibid* 1.p.95-6.

<sup>144</sup> Reydam, *ibid* 1,p.151.

<sup>145</sup> *Ibid*,p.151-155.

<sup>146</sup> *Ibid*, p. 150-151.

<sup>147</sup> Article 9 of the ICTY Statute and article 8 of the ICTR Statute.

<sup>148</sup> In *Jorgic*, the court considered that its competence to adjudicate genocide stems from article 9 of the ICTY Statute and not article VI of the Genocide Convention. Institute for International Law, Working

*Niyonteze* in Switzerland<sup>149</sup> and in the case of Munyeshyaka in which the *Cour de Cassation* held that the defendant is triable in France by virtue of the French legislation implementing the ICTR Statute and in pursuance of the Security Council Resolution 978 issued on 27 February 1995 which urged states

“[t]o arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal of Rwanda”.<sup>150</sup>

Moreover, Rwandan courts had practiced the death penalty. This obliged the European countries to prosecute because extraditing to Rwanda was impossible pursuant to Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty which forbids extradition to countries where the person might face execution.<sup>151</sup>

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#### 4.2 Grave Breaches of the Geneva Conventions

The conventions provide for the *aut dedere aut judicare* enforcement which shall be applied as the following:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, any of the grave breaches of the present as defined in the following Article and shall bring such persons regardless of their nationality, before its own courts. It may also if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High

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Paper No 87, p. 6. available at: <http://law.kuleuven.be/iir/nl/wp/WP/WP87e.pdf> (last visited 12/06/2006)

<sup>149</sup> Reydam's, p.201.

<sup>150</sup> Ibid, 138.

<sup>151</sup> Ibid, p.133-134.

Contracting Party concerned, provided such High Contracting Party has made out a prima facie<sup>152</sup>.

Some maintain that by not requiring a nationality or territorial link to the prosecuting state, the provisions provide for universal jurisdiction, or at least they cannot be interpreted *a contrario* so as to exclude a voluntary exercise of universal jurisdiction.<sup>153</sup> Others interpret states' agreement to enact the necessary legislation for effective domestic jurisdiction as recognition of the parties' expansion of the conventions enforcement form.<sup>154</sup>

Such views are inaccurate because the text limits the right to prosecute to the state where the suspect is found and to interested state which will be the injured state or the home country of the accused and it does not create any obligation to search, arrest and prosecute in the case where the offender is not present in the prosecuting state.

Further, the obligation imposed on all parties to enact municipal legislations so as to make grave breaches of the conventions punishable is not the assertion of universal jurisdiction, but merely the provision of the legislative basis for jurisdiction in the event that the contracting party is concerned which means its involvement in hostilities as a belligerent.<sup>155</sup>

Moreover, as for the non-existence of case law, it is doubtful whether a neutral state-party is entitled to request the extradition and the prosecution of a suspect. The prosecutions of present Serbs or Rwandans in Germany, France, Denmark, Netherlands and Austria did not involve an extradition request from unconcerned states.

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<sup>152</sup> Articles number 49, 50, 129, 146 in the four conventions respectively and 85.1,86.1 Additional Protocol I.

<sup>153</sup> Randall, *ibid* 12.p.816l.

<sup>154</sup> Collen Enache –Brown and Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*. 43. McGill,L.J (1998).p 622.

<sup>155</sup> Bowett, *ibid* 34.p.12.

In the *arrest warrant case* Belgium charged Mr Yerodia with grave breaches and crimes against humanity without claiming that the 1949 conventions provided it with jurisdiction to judge the accused and. Neither did it argue that the Congo, as a party to conventions, was obligated to extradite or prosecute. Belgium considered the exercise of universal jurisdiction under the conventions as an option and not an obligation.

#### 4.3 Crimes against Humanity

There is no specialized convention on the crimes; there are only two non-binding instruments:

First, the General Assembly resolution 3074 of December 1973.<sup>156</sup>

Second, the Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission in 1996, which suggests that states should establish their jurisdiction, extradite or prosecute, over crimes against humanity. In the Javor case the *Cour d'Appel* declined jurisdiction over crimes against humanity committed in Bosnia-Herzegovina and rejected the application of the General Assembly resolution because it did not contain any role of universal jurisdiction<sup>157</sup>.

The judicial practice in all the states suggests, except for Belgium before the amendment of its 1993/99 law, they have confined their jurisdiction over the crime to territorial , protective or passive jurisdictional grounds.

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<sup>156</sup> Ibid 67.

<sup>157</sup> Benavides, *ibid.*26.p.66-7.

## **5 Conclusion**

The debate over the universal jurisdiction has been revitalized by the creation and practise of the international tribunals which spurred states to activate already existing penal provisions of the various international conventions and to exercise accordingly their criminal jurisdiction extraterritorially.

None of the international conventions provide for universal jurisdiction, they instead confer the right to assert jurisdiction on the forum state. When exercising its jurisdiction the forum state is discharging a treaty obligation, and its competence is based on the prior consent of the other parties which by virtue of their ratification have delegated their respective competence to the forum state. Therefore, this form of jurisdiction is ought to be distinguished from the universality principle.

Moreover, the prosecution of a present alien may not be universal even where the exercise of extradite or try is not premised on a treaty but is consented to by the territorial or the nationality state.

Nonetheless, shall a state decide to exercise the extradite or try mechanism without being obliged to so act by a treaty and absent the consent of the state that possesses the strongest connection to the offence, still it is more plausible to consider its competence as being derivative of either its territorial jurisdiction because it has a substantial connection to the alleged crime, or the nationality principle due to the fact that by choosing to domicile in that particular state the alleged criminal is actually submitting himself to its laws. In all cases when extradition fails, the forum state could prosecute pursuant to its undeniable right as a sovereign to protect its vital interests such as security, legal order and sense of justice from the potential threats which the presence of international criminals entail.



In the light of the foregoing, it becomes obvious that in most cases the prosecution of international crimes based on the alleged universal jurisdiction can be legitimized by applying traditional grounds of jurisdictions.

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The paper has demonstrated that the debate has been more of theoretical than practical concern because states tend to prosecute only when their own interests are at stake and pursuant to traditional grounds of jurisdiction.

Henceforth, universal jurisdiction has concordantly been used by national courts, in the majority of states, in conjunction with the *jus cogens* argument only as a humanitarian rhetoric to supplement already existed and uncontested classical jurisdiction, for instance the *Eichmann Case*.

The Belgian legislation and practice constituted the only instance of universal jurisdiction in cases where the alleged criminal was not present and the crimes had no nexus with the state. Belgium had to give-in to the political pressure of the suspects' national states and in August 2003 it amended its laws and curtailed the reach of its jurisdiction. Accordingly, it appears very doubtful that any state will follow the Belgian experiment in the future.

In the *Arrest Warrant Case*, absent an international treaty regulating the issue of immunity of foreign ministers, the ICJ deduced from the non-existence of states practice or *opinion juris necessitates*, that the prosecution of foreign ministers is illegitimate even when they are accused of perpetrating international crimes.

By applying the same logical method to universal jurisdiction, it is warranted to conclude that states' refusal to adopt the principle in the international conventions and the lack of consistent judicial practice are sufficient to maintain that universal jurisdiction has not been accepted as an established principle of jurisdiction and that it is more plausible to view it as a proposal.

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